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No. 87-1774

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,

Petitioners,

vs.

STATE OF TENNESSEE, et al.,

Respondents.

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TENNESSEE CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of State of Tennessee, Article 2 § 24:

> Sec. 24. Appropriation of public moneys.—No public money shall be expended except pursuant to appropriations made by law. Expenditures for any fiscal year shall not exceed the state's revenues and reserves, including the proceeds of any debt obligation, for that year. No debt obligation, except as shall be repaid within the fiscal year of issuance, shall be authorized for the current operation of any state service or program, nor shall the proceeds of any debt obligation be expended for a purpose other than that for which it was authorized.
>
> In no year shall the rate of growth of appropriations from state tax revenues exceed the estimated rate of growth of the state's economy as determined by law. No appropriation in excess of this limitation shall be made unless the General Assembly shall, by law containing no other subject matter, set forth the dollar amount and the rate by which the limit will be exceeded.
>
> Any law requiring the expenditure of state funds shall be null and void unless, during the session in which the act receives final passage, an appropriation is made for the estimated first year's funding.
>
> No law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost.
>
> An accurate financial statement of the state's fiscal condition shall be published annually. [As amended; Adopted in Convention November 30, 1977; approved at election March 7, 1978; Proclaimed by Governor, March 31, 1978.]

Tenn. Code Ann. § 49-3-315 (Supp. 1987):

> 49-3-315. Local tax levy. — Special transportation tax levy and fund—(a) For each LEA there

shall be levied for current operation and maintenance not more than one school tax for all such grades as may be included in the LEA. Each LEA shall place in one (1) separate school fund all school revenues for current school operation purposes received from the state, county, and other political subdivisions, if any. However, any county in which only one (1) pupil transportation system is operated and which has within its borders a city or special district operating a system of public schools and which county in the current school year operates a system of public school transportation, may levy a special tax to cover that portion of the total cost of such public school transportation system as is in excess of the state funds appropriated for student transportation of such county. The proceeds of such special transportation tax levy shall be set up in a special account hereinafter to be known as the "public school pupil transportation fund" and shall be disbursed on order of the county board of education for public school transportation services only. All school funds for current operation and maintenance purposes collected by any county, except the funds raised by any local special student transportation tax levy as authorized in this subsection, shall be apportioned by the county trustee among the LEA's therein on the basis of the WFTEADA maintained by each, during the current school year. For the purposes of making the apportionment of local school funds as set forth in this subsection, and in defining the WFTEADA for the current school year, the county superintendent of schools and the county trustee shall be guided by the following procedure:

(1) The county superintendent of schools shall recertify to the county trustee at the end of the first quarter of the current fiscal year the WFTEADA during the preceding school year;

(2) During each of the first and second quarters of the current school year the county trustee shall use

the WFTEADA figure for the preceding school year as recertified to him by the county superintendent of schools in making the tentative apportionments of the school funds as provided for in this subsection during the first and second quarters of the current school year;

(3) Before the end of the third quarter of the current school year the county superintendent of schools shall certify to the county trustee the best estimate which he can make of the WFTEADA in the schools of the LEA's in such county, during the current school year; and upon this best estimate, the county trustee shall make the tentative apportionments of school funds for the third quarter of the current school year;

(4) As early as possible before the close of the current school year, the county superintendent of schools shall certify to the county trustee the correct WFTEADA for the entire current school year;

(5) Thereupon, the county trustee shall apportion the entire amount of county school funds for the current school year in keeping with the provisions of this subsection, on the basis of the correct total WFTEADA during the current school year in the LEA's, making such adjustments as may be necessary on account of the tentative apportionments made to such LEA's during the first three (3) quarters of the current school year.

(b)(1) The state school funds distributed under the provisions of this part to a county for county schools shall be paid to the county trustee in the amounts as certified under the authority of the commissioner.

(2) Such funds for a LEA other than a county LEA shall be distributed directly to the treasurer or proper fiscal agent of such LEA in the amounts as certified under the authority of the commissioner.

(3) The county trustee shall be properly bonded as now provided by law; the treasurer or fiscal agent of LEAs, other than a county LEA, shall be bonded in an amount, in the manner in the form and be conditioned as prescribed by law for county trustees. Immediately upon receipt of a properly executed bond, the state comptroller shall notify the commissioner of education. [Acts 1977, ch. 289, § 12; 1981, ch. 357, § 1; T.C.A. § 49-614; Acts 1987, ch. 21, § 1.]

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT W. KELLEY,	)	
	)	
Plaintiff	)	
	)	
VS.	)	
	)	
METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,	)	CIVIL ACTION
	)	
Defendants and Third Party Plaintiffs	)	NOS. 2094, 2956
	)	
VS.	)	
	)	
STATE OF TENNESSEE; LAMAR ALEXANDER, Governor of the State of Tennessee; ROBERT L. McELRATH, Commissioner of Education; STATE BOARD OF EDUCATION and its members in their offical capacities TOY F. REID, RICHARD E. RAY, KATHY KEMP, WILLIAM H. SWAIN, NELSON ANDREWS, FRANK GORRELL, JUDGE PAUL SUMMERS, CYNTHIA BOND, S. C. KOPALD, JR., and its Executive Director, BRENT POULTON,	)	(Filed March 27, 1985)
	)	
Third party Defendants	)	

AMENDED THIRD PARTY COMPLAINT

1. On September 23, 1955, plaintiff class members filed a complaint against the defendant Board of Educa-

tion of the City of Nashville, Davidson County, Tennessee, the individual members of the Board, the Superintendent of Schools of the City of Nashville, and other school employees in a case styled *Kelley v. Board of Education of Nashville and Davidson County, Tennessee, et al.*, Civil Action No. 2094.

2. On September 19, 1960, plaintiff class members filed a similar complaint against the Board of Education of Davidson County, the individual members of the Board, and the Superintendent of the County school system in a case styled *Maxwell v. Board of Education of Davidson County*, Civil Action No. 2956.

3. On September 10, 1963, after the advent of the Metropolitan Government of Nashville and Davidson County, these cases were consolidated, and as of December 4, 1964, the Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, its individual members, and its Director of Schools, were substituted as party defendants for the original defendants in both actions previously described.

4. The third party defendant, State of Tennessee, is the governmental entity which has been in the past, and is at present, the ultimate policy maker for the various systems of public education across the state. The State of Tennessee performs various functions regarding public education, including the supervision and the funding of the largest part of the local school system's budget through the *"Minimum Foundation Program,"* and other funding programs. In actuality, public education in the State of Tennessee is a function of the State of Tennessee rather than of any individual county or city.

5. The third party defendant, Governor Lamar Alexander, is sued in his official capacity as the Chief Executive Officer of this state. The Governor and his predecessors have been and are charged with the enforcement of all state laws, including the segregation laws which are the subject of this action. Under the recently enacted "Public Education Grovernance Reform Act of 1984," the Governor appoints the appointed members of the Board of Education (eight of nine) with the consent of the legislature. (T.C.A. § 49-1-301.) The Governor also appoints the Commissioner of Education and proposes legislation for the governance of public elementary and secondary schools and budgets for the state funding of elementary and secondary schools.

6. The third party defendant, Commissioner of Education Robert L. McElrath, is sued in his official capacity as head of the Department of Education and as former Chairman of the Board of Education. (T.C.A. § 49-1-201 and its precursor statutes.) In the past, the Commissioner and his predecessors have had the primary role in the administration of the state's policies regarding public education pursuant to T.C.A. §§ 49-1-101 *et seq.* and their precursor statutes. Under the Public Education Governance Reform Act of 1984, the Commissioner of Education is charged with, among other duties, the provision of such assistance as is necessary to the State Board of Education in implementing the Board's policies and procedures, and the making of recommendations for policies to the Board of Education. (T.C.A. §§ 49-1-102 and 40-1-201.)

7. The third party defendants, State Board of Education, and its members, Toy F. Reid, Richard E. Ray,

Kathy Kemp, William H. Swain, Nelson Andrews, Frank Gorrell, Judge Paul Summers, Cynthia Bond, S. C. Kopald, Jr., and its Executive Director, Brent Poulton are, and have been in the past (along with the Comissioner) responsible for the administration of public elementary, junior high, and high schools at the state level, including, but not limited to, the establishment of rules and regulations for the operation of local public schools, grades K-12. (T.C.A. §§ 49-1-102, 49-1-302 and their precursor statutes.) The current duties of the Board of Education, its members and Director, as described in detail in the Public Education Goverance Reform Act of 1984, T.C.A. §§ 49-1-301 *et seq.* and the Comprehensive Education Reform Act of 1984 (Master Teacher Program), T.C.A. §§ 49-5001, *et seq.* are indicative of these defendants' and the other state defendants' authority for the governance of public education in grades K-12 throughout the state.

JURISDICTION

8. Jurisdiction of this third party complaint is ancillary in nature.

ALLEGATIONS

9. At the time the original complaint was filed in this case, the State of Tennessee had declared public education a state function. Article 11, Section 12 of the Constitution of Tennessee provided, *inter alia*:

> Knowledge, learning and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the state, being highly conducive to the promotion of this end, it shall be the duty of the General Assembly in all

> future periods of this Government, to cherish literature and science and the fund called common school fund, and all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever, heretofore by law appropriated by the General Assembly of this state for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, the principal of which shall never be diminished by legislative appropriations; and the interest thereof shall be inviably appropriated to the support and encouragement of common schools throughout the state, and for the equal benefit of all people thereof; and no law shall be made authorizing said fund or any part thereof to be divested to any other use than the support and encouragement of common schools. The state taxes, derived hereafter from polls shall be appropriated to educational purposes, in such manner as the General Assembly shall from time to time direct by law.
>
> [Amended March 31, 1978]

Pursuant to this mandate, the legislature of Tennessee established a uniform system of free public education, as set out in the Code of Tennessee of 1932, Sections 2306-2540.3, which system continues to this day under the 1978 amendment to Article 11, Section 12, and under T.C.A. §§ 49-1-101 *et seq.* and its precursor statutes. The administration of this system of public education has been in the past and is now vested in the Commissioner of Education and the State Board of Education, and also in the county and city Board of Education and their superintendents. (T.C.A. § 49-1-102 and its precursor statutes.)

10. Through the "Minimum Foundation Program" and other funding provisions contained in T.C.A. §§ 49-3-101 *et seq.* and their precursor statutes, the third party

defendants have direct control over the largest percentage of monies received by local school systems. Criteria for expenditures of these funds have been established by the state defendants.

11. At the time this suit was filed, it was the policy of the State of Tennessee, through the Constitution of the State of Tennessee and through state statute, that all schools in this state would be segregated. The applicable provisions at that time were as follows:

> Constitution of 1870, Article 11, Section 12:
>
> . . . No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. . . .
>
> Code of Tennessee, 1932, Sections 11395 6888a37.
>
> Unlawful for white and colored persons to attend same school.—It shall be unlawful for any school, academy, college or other place of learning to allow white and colored persons to attend the same school, academy, or other place of learning. (1901, Chapter 7, Section 1.)
>
> Code of Tennessee, 1932, Sections 11396 6888a38.
>
> Unlawful for teacher to allow such mixed attendance to to teach them in same class.—It shall be unlawful for any teacher, academy, or school of learning to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent or procurement. (*Ib.*, Section 2.)
>
> Code of Tennessee, 1932, Sections 11397 6888a39.
>
> Violation is a misdemeanor fine and imprisonment.—Any person violating any of the provisions of this

Article, shall be guilty of a misdemeanor and, upon conviction, shall be fined for each offense $50, and imprisonment not less than 30 days nor more than 6 months. (*Ib.*, Section 4, modified.)

Michie's Tennessee Code of 1938, Section 2377.

Schools designed for children; separate schools for white and nego children. The county board of education shall designate the [elementary] schools which the children shall attend; provided, that separate schools shall be established and maintained for white and negro children. (1925, Chapter 115, Section 13.) Michie's Tennessee Code of 1938, Section 2393(9).

Who admitted to high school; separation of white and colored pupils—Junior high schools sharing in the state and county high school funds shall be open without tuition to all children of the county; provided, that only those who have completed the eight grades of the elementary school or their equivalent shall be admitted to junior high schools of form one; and that those who have completed the six grades of the elementary school, or their equivalent, shall be admitted to junior high schools of form two or of form three; senior high schools of four grades shall be open to all children of the county who have completed the eight grades of the elementary school or their equivalent; and senior high schools of three grades shall be open to all children of the county who have completed the ninth grade, or its equivalent, in a junior high school; provided that separate schools shall be maintained for white and nego pupils. (1931, Chapter 71, Section 1.)

12. In accordance with these state mandates, enforced by the State, the Governor, the Commissioner of Education and the State Board of Education, defendant City and County school systems established separate schools for Whites and Negroes, which schools this court and the Supreme Court of the United States subsequently found to

be contrary to law and a violation of the plaintiffs' civil rights.

13. At all times prior to this ruling by the court, the defendants Board of Education, *et al.*, were operating the separate schools, based not upon their own policy, but upon the policy mandated and enforced by the third party defendants.

14. Since the institution of this action in 1955, the plaintiffs have repeatedly asked for further relief from the named defendants, in an effort to eliminate the alleged vestiges of segregation directly resulting from policies of the third party defendants.

15. During the intervening years, the third party defendants have taken no action directed specifically toward eliminating these alleged vestiges in the defendant school system, in spite of their duty to do so.

16. Indeed, it is not clear that the third party defendants' statutes requiring segregation were ever formally stricken from the Code of Tennessee, and it was not until 1978 that the State of Tennessee struck the illegal segregation language from its Constitution.

17. During the interim phases of this litigation, it was the defendant State, the Governor, the Commissioner of Education, and the State Board of Education, not the defendant Board of Education, which promulgated the school preference law subsequently struck down by the court as in inadequate desegregation remedy. Specifically, while the defendant Board of Education in good faith grounded its desegregation plan on this state law, the court found that the law did not meet the duty to eliminate

the vestiges of prior state-imposed segregation. At the hearing of this cause on the issue, the state appeared, through its Attorney General, as an *amicus curiae* supporting the school preference law.

18. During the interim phases of this lawsuit, the state defendants have continued to promulgate and accept state laws which have been directed toward impeding local school systems in their efforts to desegregate.

19. During the interim phases of this litigation, the present defendants have expended considerable time and resources in an effort to eliminate all effects of the third party defendants' policies and procedures.

20. Since the court's order of 1971, the third party defendants have specifically approved the location of and provided substantial funds for the various comprehensive high schools around the city, which schools have been complained of by the plaintiffs. In addition, further funds from the third party defendants are anticipated as being spent on the two future comprehensive high schools under this court's order of June 1, 1983, which is directed toward elimination of the last vestiges of state-imposed segregation.

21. For the past several years, the defendant Metropolitan Board of Education, has operated its school system on a continuation or survival budget. During the period of this lawsuit, state funds for transportation to the Metropolitan Board of Education have been reduced. This short fall in funding has come at a time when the Board is attempting to implement new programs and to expand its transportation system to eliminate for all times the final

vestiges of the third party defendants' former practices pursuant to the court's order of June 1, 1983.

22. The third party defendants are and should be liable to the present defendants for a proportionate share of the responsibility for effecting a unitary school system in Nashville and Davidson County, as envisioned by the court in its order of June 1, 1983, and in previous orders.

WHEREFORE, PREMISES CONSIDERED, DEFENDANTS PRAY:

1. That process issue and be served upon the third party defendants requiring them to appear and defend, and to answer this complaint within twenty (20) days.

2. That the third party defendants be responsible as equity requires in terms of resources, time, and effort for any and all past and future remedies imposed by this court.

3. That the third party defendants be enjoined from diminishing the Board of Education's allotment of funds, or from diminishing in any way because of this action the "*Minimum Foundation Program*" or other funding programs currently operating to benefit financially the defendant Board of Education.

4. That any decree ordering the state defendants to participate in the desegregation remedy envisioned by the court provide for state funds in addition to the current level of funding provided by the state to the defendant Board of Education under the state's "*Minimum Foundation Program*" and other funding programs.

5. That the third party defendants indemnify the Board of Education for all monetary awards entered

against it, including, but not limited to, requests for attorneys' fees by the plaintiffs, now set by the District Court's judgment at $139,214.25 and costs of $361.28. Should this amount change as a result of any court decisions, this paragraph should be deemed automatically amended to include such sums.

6. That the state indemnify the Board of Education for all costs, expenses and attorneys' fees incurred as a necessary part of this litigation from 1971 to 1983 in the approximate amount of $30 million. The 1983 plan recently approved by the District Court, without objection by the state defendants, is projected to cost the school system approximately $5.9 million for the first year of operation, in addition to the $3.2 million spent annually for desegregation purposes under the 1971 order. Accordingly, the first year of operation under the new plan will cost approximately $9.1 million. Annual recurring costs of the plan will be approximately $6 million per year until 1986-87, at which time the costs will be increased by an undetermined amount when the Martin Luther King, Jr. Magnet High School for the Health Sciences is established. In addition, the plan calls for the building of two new comprehensive high schools, Goodlettsville-Madison and Pearl-Cohn at an estimated cost of $29 million. Payment for these buildings and the average annual payments on interest and principal of approximately $2.93 million per year should also be borne by the state.[1]

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[1] The first year of this desegregation plan has just been completed. In addition, bids have been let for construction of these high schools. Accordingly, the third party plaintiffs are now in

(Continued on following page)

7. That the state indemnify the Board of Education for all costs, expenses, and attorneys' fees incurred during this litigation from 1955 to 1972 should the Memorandum and Order entered by this court on February 23, 19— be reversed insofar as the finality of the 1972 order.

8. For such other and further relief as the defendants may be entitled.

WILLIS & KNIGHT

By: /s/ William R. Willis, Jr.

By: /s/ Marian F. Harrison
215 Second Avenue North
Nashville, TN 37201
Attorneys for Defendants and
Third Party Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing amended complaint has been forwarded to Mr. Steve Doughty, Deputy Attorney General, 450 James Robertson Parkway, Nashville, TN 37219 and Mr. Avon Williams, Attorney for Plaintiffs, 203 Second Avenue North, Nashville, TN 37201 on this 27th day of March, 1985.

WILLIS & KNIGHT

By: /s/ Marian F. Harrison

(Continued from previous page)

a position to better estimate what its expenses are. As soon as they have been ascertained, those figures will be presented as an additional amendment in time for the hearing on the amount of the state's participation, if any.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT W. KELLEY, ET AL.	)	
	)	
VS.	)	
	)	
METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL.	)	
	)	
VS.	)	NOS. 2094, 2956
	)	
STATE OF TENNESSEE; LAMAR ALEXANDER, GOVERNOR OF THE STATE OF TENNESSEE; ROBERT L. McELRATH, COMMISSIONER OF EDUCATION; and STATE BOARD OF EDUCATION	)	(Filed March 26, 1981)

THIRD PARTY COMPLAINT

1. On September 23, 1955, Plaintiff class members filed a Complaint against the Defendant Board of Education of the City of Nashville, Davidson County, Tennessee, the individual members of the Board, the Superintendent of Schools of the City of Nashville, and other school employees in a case styled *Kelley v. Board of Education of Nashville and Davidson County, Tennessee, et al,* Civil Action No. 2094.

2. On September 19, 1960, Plaintiff class members filed a similar Complaint against the Board of Education of Davidson County, the individual members of the Board, and the Superintendent of the County school system in a

case styled *Maxwell v. Board of Education of Davidson County,* Civil Action No. 2956.

3. On September 10, 1963, after the advent of the Metropolitan Government of Nashville and Davidson County, these cases were consolidated, and as of December 4, 1964, the Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, its individual members, and its Director of Schools, were substituted as party Defendants for the original Defendants in both actions previously described.

4. The Third Party Defendant State of Tennessee is the governmental entity which has been in the past, and is at present, the ultimate policy maker for the various systems of public education across the state. The State of Tennessee performs various functions regarding public education, including the supervision and the funding of the largest part of the local school system's budget through the "*Minimum Foundation Program.*" In actuality, public education in the State of Tennessee is a function of the State of Tennessee rather than of any individual county or city.

5. The Third Party Defendant Governor, Lamar Alexander, is sued in his official capacity as the chief executive officer of this state. The Governor has been and is charged with the enforcement of all state laws, including the segregation laws which are the subject of this action. The Governor appoints the Commissioner of Education and prepares proposed budgets for the state funding of education.

6. The Third Party Defendant Commissioner of Education, Robert L. McElrath, is sued in his official

capacity as head of the Department of Education. The Commissioner bears the primary responsibility for enforcement of the state's policies regarding public education pursuant to T.C.A. §§ 49-101, *et seq.*, and its precursor statutes.

7. The Third Party Defendant State Board of Education participates, along with the Commissioner, in the administration of public education in Tennessee, pursuant to T.C.A. § 49-102, and its precursor statutes.

JURISDICTION

8. Jurisdiction of this Third Party Complaint is ancillary in nature.

ALLEGATIONS

9. At the time the original Complaint was filed in this case, the State of Tennessee had declared public education a state function. Article 11, Section 12 of the Constitution of Tennessee provided, *inter alia*:

> "Knowledge, learning and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the state, being highly conducive to the promotion of this end, it shall be the duty of the General Assembly in all future periods of this Government, to cherish literature and science and the fund called common school fund, and all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever, heretofore by law appropriated by the General Assembly of this state for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, the principal of which shall never be diminished by legislative appropriations; and the interest thereof shall be inviably appropriated

> to the support and encouragement of common schools throughout the state, and for the equal benefit of all people thereof; and no law shall be made authorizing said fund or any part thereof to be divested to any other use than the support and encouragement of common schools. The state taxes, derived hereafter from polls shall be appropriated to educational purposes, in such manner as the General Assembly shall from time to time direct by law."
>
> [Amended March 31, 1978.]

Pursuant to this mandate, the Legislature of Tennessee established a uniform system of free public education, as set out in the Code of Tennessee of 1932, Sections 2306-2540.3, which system continues to this day under the 1978 amendment to Article 11, Section 12, and under T.C.A. §§ 49-101, *et seq.* The administration of this system of public education has been in the past and is now vested in the Commissioner of Education and the State Board of Education, and also in the county and city boards of education and their superintendents. T.C.A. § 49-104.

10. Through the "*Minimum Foundation Program,*" and other funding provisions contained in T.C.A. §§ 49-601, *et seq.*, and its precursor statutes, the State of Tennessee, the Governor, the Commissioner of Education, and the State Board of Education have direct control over the largest percentage of monies received by local school systems. Criteria for expenditures of these funds have been established by the State of Tennessee, the Governor, the Commissioner of Education, and the State Board of Education.

11. At the time this suit was filed, it was the policy of the State of Tennessee, through the Constitution of the

State of Tennessee and through state statute, that all schools in this state would be segregated. The applicable provisions at that time were as follows:

> Constitution of 1870, Article 11, Section 12: ". . . No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. . . ."
>
> Code of Tennessee, 1932, Sections 1139568 68888a37.
>
> "Unlawful for white and colored persons to attend same school.—It shall be unlawful for any school, academy, college or other place of learning to allow white and colored persons to attend the same school, academy, or other place of learning." (1901, Chapter 7, Section 1).
>
> Code of Tennessee, 1932, Sections 11396 6888a38.
>
> "Unlawful for teacher to allow such mixed attendance or to teach them in same class.—It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent or procurement." (*Ib.*, Section 2)
>
> Code of Tennessee, 1932, Sections 11397 6888a39.
>
> "Violation is a misdemeanor; fine and imprisonment. —Any person violating any of the provisions of this Article, shall be guilty of a misdemeanor and, upon conviction, shall be fined for each offense $50, and imprisonment not less than 30 days nor more than 6 months." (*Ib.*, Section 4, modified.)

Michie's Tennessee Code of 1938, Section 2377.

"Schools designated for children; separate schools for white and negro children. The county board of education shall designate the [elementary] schools which the children shall attend; provided, that separate schools shall be established and maintained for white and negro children." (1925, Chapter 115, Section 13).

Michie's Tennessee Code of 1938, Section 2393(9).

"Who admitted to high school; separation of white and colored pupils—Junior high schools sharing in the state and county high school funds shall be open without tuition to all children of the county; provided, that only those who have completed the eight grades of the elementary school or their equivalent shall be admitted to junior high schools of form one; and that those who have completed the six grades of the elementary school, or their equivalent, shall be admitted to junior high schools of form two or of form three; senior high schools of four grades shall be open to all children of the county who have completed the eight grades of the elementary school or their equivalent; and senior high schools of three grades shall be open to all children of the county who have completed the ninth grade, or its equivalent, in a junior high school; provided that separate schools shall be maintained for white and negro pupils." (1931, Chapter 71, Section 1).

12. In accordance with these state mandates, enforced by the State, the Governor, the Commissioner of Education and the State Board of Educataion, Defendant City and County school systems established separate schools for Whites and Negroes, which schools this Court and the Supreme Court of the United States subsequently found to be contrary to law and a violation of the Plaintiffs' civil rights.

13. At all times prior to this ruling by the Court, the Defendants Board of Education, et al, were operating the separate schools, based not upon their own policy, but upon the policy mandated and enforced by the Third Party Defendants.

14. Since the institution of this action in 1955, the Plaintiffs have repeatedly asked for further relief from the named Defendants, in an effort to eliminate the alleged vestiges of segregation directly resulting from policies of the Third Party Defendants.

15. During the intervening years, the Third Party Defendants have taken no action directed specifically toward eliminating these alleged vestiges in the Defendant school system, in spite of their duty to do so.

16. Indeed, it is not clear that the Third Party Defendants' statutes requiring segregation were ever formally stricken from the Code of Tennessee, and it was not until 1978 that the State of Tennessee struck the illegal segregation language from its Constitution.

17. During the interim phases of this litigation, it was the Defendant State, the Governor, the Commissioner of Education, and the State Board of Education, not the Defendant Board of Education, which promulgated the school preference law subsequently struck down by the Court as an inadequate desegregation remedy. Specifically, while the Defendant Board of Education in good faith grounded its desegregation plan on this state law, the Court found that the law did not meet the duty to eliminate the vestiges of prior state-imposed segregation. At the hearing of this cause on the issue, the state appeared,

through its Attorney General, as an *amicus curiae* supporting the school preference law.

18. During the interim phases of this litigation, the present Defendants have expended considerable time and resources in an effort to eliminate all effects of the Third Party Defendants' policies and practices.

19. Since the Court's Order of 1971, the Third Party Defendants have specifically approved the location of and provided substantial funds for the various comprehensive high schools around the city, which schools have been complained of by the Plaintiffs. In addition, further funds from the Third Party Defendant are anticipated as being spent on the two future comprehensive high schools under the Court's Order of May 20, 1980, which is directed toward elimination of the last vestiges of state-imposed segregation.

20. For the past several years the Defendant Metropolitan Board of Education, has operated its school system on a continuation or survival budget. It is the Defendant Board of Education's understanding that the state Defendants are suggesting and intend at this time to decrease their "*Minimum Foundation Grants,*" thereby reducing the Board's budget below continuation status. This comes at a time when the Board is attempting to implement new programs to eliminate for all times the final vestiges of the Third Party Defendants' former practices pursuant to the Court's Order of May 20, 1980.

21. The Third Party Defendants are and should be liable to the present Defendants for a proportionate share of the responsibility for effecting a unitary school system

in Nashville and Davidson County, as envisioned by the Court in its Order of May 20, 1980.

WHEREFORE, PREMISES CONSIDERED, DEFENDANTS PRAY:

1. That process issue and be served upon the Third Party Defendants requiring them to appear and defend, and to answer this Complaint within twenty (20) days.

2. That the Third Party Defendants be made partially responsible as equity requires in terms of resources, time, and effort for any and all future remedies imposed by this Court.

3. That the Third Party Defendants be enjoined from diminishing the Board of Education's allotment of funds, or from diminishing in any way because of this action the "*Minimum Foundation Program*" or other funding programs currently operating to benefit financially the Defendant Board of Education.

4. That any decree ordering the State Defendants to participate in the desegregation remedy envisioned by the Court provide for state funds in addition to the current level of funding provided by the state to the Defer dant Board of Education under the state's "*Minimum Foundation Program*" and other funding programs.

5. For such other and further relief as the Defendants may be entitled.

WILLIS & KNIGHT

/s/ By William R. Willis, Jr.

William R. Willis, Jr.

/s/ By Marian F. Harrison

Marian F. Harrison
Attorneys for Defendant Board of Education
215 Second Avenue, North
Nashville, Tennessee 37201

I CERTIFY THAT A COPY OF THE ABOVE PLEADING HAS BEEN FURNISHED TO COUNSEL FOR ALL INTERESTED PARTIES BY DELIVERY OR BY PLACING SAME IN THE UNITED STATES MAIL, POSTAGE PREPAID.

THIS 26 DAY OF MARCH, 1981.

WILLIS & KNIGHT

/s/ By Marian F. Harrison

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT W. KELLEY, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
VS.	)	NOS. 2094, 2956
	)	
METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL.,	)	(Received March 9, 1983)
	)	
Defendants.	)	

MEMORANDUM

On March 26, 1981, this Court granted, pursuant to Rule 14, Fed. R. Civ. P., defendant Board of Education's motion to make the State of Tennessee, the Governor of the State of Tennessee, the Commissioner of Education, and the State Board of Education ("State defendants") parties to this lawsuit. Now pending is State defendants' motion to vacate that order.

This Court has previously documented the facts and issues of Nashville school desegregation case which is now entering its twenty eighth year, and that history will not be repeated here. See 492 F. Supp. 167 (M.D. Tenn. 1980). The only issue here is whether the State defendants should remain as parties to this lawsuit. The State defendants have moved the Court to vacate its March 26, 1981 order and thereby eliminate the State defendants' exposure to a future ruling that it must bear some of the costs incurred by defendant Board of Education ("Board").

State defendants contend that their rights have been unduly prejudiced by their entry into the lawsuit some twenty-six years after its inception and less than one week before this Court had scheduled final hearings on the issue of pupil assignment. Moreover, State defendants argue that they are now being asked to contribute potentially large sums of money to implement a plan in which they had no meaningful input, even though they had considerable professional expertise which could have been utilized had there been more time to do so.

Other equitable principles, however, militate in favor of keeping the State defendants as parties in this litigation. "It is a basic equitable principle that the wrongdoer is liable for the cost of rectifying his wrongful conduct." *United States v. Board of School Commissioners of Indianapolis,* 677 F. 2d 1185, 1188 (7th Cir. 1982), *cert. denied,* 51 U.S.L.W. 3460 (U.S. Dec. 13, 1982) (No. 82-479). In that case, the Seventh Circuit affirmed the district court's ruling that the State of Indiana should bear the entire cost of desegregating the Indianapolis schools. 677 F. 2d at 1186.

It is undisputed that wrongdoing on the part of the State of Tennessee is a [sic] least partially responsible for the segregation of Nashville schools. At the time this suit was filed, the Constitution of the State of Tennessee as well as a number of state statutes mandated a segregated school system. Article 11, Section 12 of the Tennessee Constitution provided that

> No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school.

See also Tenn. Code Ann. Sec. 49-3701 *et. seq.* The historical fact of de jure segregation in Tennessee continues to affect the stance taken by the courts in fashioning the appropriate desegregation remedy. See *Kelley v. Metropolitan City Board of Education,* No. 81-5370, July 27, 1982 (6th Cir.) (slip opinion at p.2).

The Supreme Court has stated that

> (w)here plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown v. Board of Education,* 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954) (Brown I), the State automatically assumes an affirmative duty "to effectuate a transition to a racially non-discriminatory school system," *Brown v. Board of Education,* 349 U.S. 294, 301, 99 L.Ed. 1083, 75 S.Ct. 753 (1955) (Brown II), see also *Green v. County School Board,* 391 U.S. 430, 437-438, 20 L.Ed. 2d 716, 88 S.Ct. 1689 (1968), that is, to eliminate from the public schools within their school system "all vestiges of state-imposed segregation." *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15, 28 L.Ed. 2d 554, 91 S.Ct. 1267 (1971).

Keyes v. School District No. 1, 413 U.S. 189, 200, 37 L.Ed. 2d 548, 558-559, 93 S.Ct. 2686, — (1973).

Thus, it is appropriate for the State defendants to be involved in this action, even at this late date. In practical terms, State defendants have suffered minimal prejudice. This case has been fully litigated by the Board to such an extent that the legal rights of State defendants have not been impaired. State defendants, with some justification, also argue that the Board could have avoided incurring some costs by relying at an earlier date on the professional

expertise possessed by the State. This consideration does not directly affect the immediate question of whether state defendants should remain as defendants, but it will be relevant when the Court addresses the question of what portion of the costs involved in the Nashville desegregation plan should be borne by State defendants.

Furthermore, it is noteworthy that State defendants have had the opportunity to participate in the formulation of the desegregation plan for the 1983-84 school year, a plan which has not yet been adopted by this Court. Although the order making State defendants parties to this action did not provide State defendants a meaningful opportunity to participate in the 1981 hearings, they have been parties during the most recent deliberations necessitated by the Sixth Circuit's order in July 1982 reversing portions of this Court's 1981 desegregation plan. The motion to vacate the March 26, 1981 order making State defendants parties to this action did not act as a stay to the original order. Consequently, State defendants have had, and continue to have, the opportunity to participate in the fashioning of a desegregation plan. This opportunity is more than the State of Arkansas was afforded in one recent desegregation case. See *United States v. State of Arkansas,* No. LR-C-72-290, April 9, 1980 (E. D. Ark) (State defendants dismissed prior to adoption of remedy but reinstated one year after entry of order implementing plan).

In conclusion, the Court finds that any prejudice caused State defendants by being named parties in this litigation at such a late date is more than outweighed by other equitable considerations. The State of Tennessee

and the other State defendants must fulfill their duty to effectuate the desegregation plan and eliminate the inequities of a state-imposed segregated public school system.

/s/ Thomas A. Wiseman, Jr.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT W. KELLEY, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	CIVIL ACTION
	)	NOS. 2094, 2956
METROPOLITAN COUNTY	)	
BOARD OF EDUCATION OF	)	(Received
NASHVILLE AND DAVIDSON	)	March 9, 1983)
COUNTY, TENNESSEE,	)	
ET AL.,	)	
	)	
Defendants.	)	

ORDER

In accordance with the accompanying Memorandum, it is hereby ORDERED that State Defendants' motion to vacate this Court's order making them parties to this action is denied.

ENTERED:

/s/ Thomas A. Wiseman, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

ROBERT W. KELLEY, et al.	)	
	)	CIVIL
	)	ACTIONS:
V.	)	2094 and 2956
	)	
	)	(Received
METROPOLITAN COUNTY BOARD OF EDUCATION, et al.	)	August 19, 1972)

MEMORANDUM TO ORDER ISSUED AUGUST 17, 1972

The defendant school board presented certain hardships in the administration of the integrated school system. Solution of this problem involved either: (a) resegregation of the system, or (b) purchasing twenty-nine (29) busses at a cost of less than one (1) percent of the current budget.

The immediate background of this petition filed by the school board is:

On December 18, 1970, the Sixth Circuit Court of Appeals ordered the District Court to implement desegregation of the dual school system of Metropolitan Nashville, Davidson County.

In July, 1971, an integration plan was approved by the District Court.

An appeal was taken to the Sixth Circuit Court of Appeals which affirmed the holding of the District Court in dismantling the dual school system.

In the Court of Appeals and now in this Court, the school board asserts that in effect the implementation of

the plan creates hardships which endanger the health and safety of certain of the students.

The matter was brought to the attention of this Court by a petition which contained two parts. Part II sought minor changes in the zone lines of the elementary schools as set forth in the petition. Since, in accordance with the original order entered in this case, the school board could have made said minor changes without permission from the Court and since the changes do not tend to resegregate the schools, they are approved.

Part I of the petition asserts that because of the extreme hardship on some children brought about by the required bussing [sic] of children, it is necessary to resegregate three junior high schools which would also affect the student population of twelve junior high schools.

The reason advanced for the necessity of the resegregation is that it does not have sufficient busses to transport the children as required by the integration order, without requiring some children to walk home from school after dark or walk home in the dark after having alighted from the bus. On some occasions they are required to walk on streets without sidewalks. This is due to the lack of twenty-nine busses. By the resegregation of the three junior high schools with the consequent effect on nine other junior high schools, twenty-nine busses could be freed to transport the children so that they could leave the school grounds at an earlier hour and reach home before dark.

In the school year 1970-71 approximately 34,000 students were transported by the defendants to maintain a segregated school system, which since 1954 has been for-

bidden by the law. As a result of the court order 45,000 school students were transported during the 1971-72 school year. The school board transported these students by the use of 211 large busses. In order to implement the integration plan additional busses were needed. The school board, seeking a grant of $3,714,000.00, applied to the federal government for funds to purchase busses. This request was denied. Thereafter the school board requested the City Council to furnish funds for the purchase of additional school busses. This the City Council refused to do. No busses were purchased to implement the plan. As a result of the failure to obtain funds the school board staggered the opening school hours from 7:00 a.m. to 10:00 a.m. each morning. In order to comply with state requirements that each student have a certain minimum number of hours of classroom attendance the afternoon departure times from schools were likewise staggered. The last bus carrying elementary students departed school at 4:30 p.m. The average time spent by a student on the bus in the school system was thirty-four minutes, with some spending more. During the winter months some children thus left school at dusk and arrived at home after dark. This applied both to those children who rode the bus and those who walked to school. Fifty-four hundred and fifty-six (5456) children were in this category. Thirty-two hundred and eighty-five (3285) were transported by bus and Twenty-one hundred and seventy-one (2171) walked. If twenty-nine busses were available the children could leave school at 4:00 p.m. and arrived home before dark.

The school board further asserts that adequate patrols are not available to furnish the protection for the children, and that some children walk on streets which have no side-

walks, and on roads which have no shoulders and are subject to unreasonable risks.

With these problems widely known, the school board submitted its request for the 1972-1973 school budget to the City Council. Although the City Council increased the board's operating budget by some $4,000,000.00 so that it totalled $65,965,263.00, it refused to appropriate any funds for the purchase of busses to implement the integration plan or to alleviate the above-mentioned hardships. The school board asserts that its 211 busses are being fully utilized, with no backup busses. It asserts that on some mornings in excess of thirty busses are inoperable. As a result, affected school children arrive at schools late in the day. It further asserts that only because of a mild winter in 1971-72 did major breakdowns not occur. Therefore it asserts that the only alternative is to resegregate three junior high schools, which plan would affect the student population of twelve junior high schools. The school board asserts that it cannot find funds in its $65,000,000.00 budget to purchase twenty-nine school busses which would cost less than $500,000.00.

Budget

The Court has examined the budget, and the accompanying testimony. It would appear that if the willingness and desire were present, less than one percent of the entire school budget (which totals $65,000,000.00) could be allocated to the acquisition of the necessary busses.

Implementation of the Plan

After going through the motions of asking the City Council for funds to purchase the needed busses, the

school board in effect said "We have complied with the court order. We have requested funds and the request has been denied. We do not need to make any additional efforts. We do not need to cut other expenditures in any other area to insure that the full constitutional rights of children are secured. We have rendered lip service to the Constitution."

The Court holds that this surface compliance does not meet the minimum requirements of dismantling a dual school system. The Court feels that a school board which has been adjudicated three times as violating the equal protection rights of school children must do more. Effort and sacrifice are not unknown to the American dream of equality under the law.

It would indeed be pleasant if public officials could evade their responsibility when unpleasant and unpopular issues arise. However, this is not possible. If individuals desire to hold public office, they must be willing to comply with minimum Constitutional requirements.

This Court finds that the defendant school board has not made a good faith effort to comply with the court ordered integration plan. It has not realigned its budget expenditures so as to sufficiently meet the minimum Constitutional requirements in the implementation of the integration plan.

Defendant school board was apprised of its apparent bad faith by the Sixth Circuit Court of Appeals. In its opinion filed May 30, 1972, the Court of Appeals, referring to a report filed on behalf of defendant pointed out that "Even more important, the statement on its face suggests that local authorities in Nashville and Davidson County

have not made good faith efforts to comply with the order of the District Judge." *Kelley, et al. v. Metropolitan County Board of Education, et al.*, Nos. 71-1778-79, filed May 30, 1972, at 24.

Findings of Fact

1. The school board did not purchase one piece of equipment for the purpose of converting the school system from a dual school system segregated by race into a unitary one.

2. By reason of the failure of the school board to purchase adequate transportation equipment, the ordered integration plan was deficiently implemented.

3. Sufficient funds are available in the school budget of the school board for the school year 1972-1973 to purchase the needed school busses.

4. No Constitutionally sufficient reason was advanced by the school board for the resegregation of the school system.

5. The school board has not made a good faith effort to obtain sufficient busses to implement the court ordered integration plan.

Conclusions of Law

In light of these findings of fact, this Court is of the opinion that the acquisition of thirty (30) additional school busses is the course best suited to both alleviate hardships present during the 1971-72 school year and to advance the orderly and efficient establishment of a unitary school system in Metropolitan Nashville. It is therefore held that the school board is directed to purchase the

additional busses. In the interim period prior to their arrival, siutable busses shall be rented or otherwise provided for. This relief is decreed as part of the continuing jurisdiction retained by this Court in its order of June 28, 1971, over the integration of the Metropolitan Nashville Davidson County School System. This relief is founded upon the inherent power of a court of equity to fashion remedies necessary to assure the implementation of its decrees. It is well established that the District Courts have wide discretion in school desegregation cases to insure the establishment of a unitary system of public education:

> "If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a District Court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971).

Since the decision of the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), this Country has been committed to the destruction of the dual school system with its inherent inequality, and to the establishment of a unitary school system with its inherent equality. Although *Brown* was specific in its abolition of the maintenance of dual school systems, it was general in its guidelines as to the manner and time of rectification. In 1968, the Supreme Court in *Green v. County School Board*, 391 U.S. 430 (1968), addressed itself to the slow pace of school desegregation, and stated:

> "The burden on a school board today is to come forward with a plan that promises realistically to work

> . . . now . . . until it is clear that state-imposed segregation has been completely removed." *Id* at 439.

Thus, having decided in 1954 that systems of segregated schools are inherently unequal, and deciding in 1968 that "now" is the time to erase the remaining vestiges of past school segregation, there still remained the question of what steps could be taken by District Courts in the implementation of unitary school systems. The answer to this came in 1971. In *Swann v. Charlotte-Mecklenburg Board of Education,* supra, the Supreme Court enunciated the guidelines to be followed by the District Courts in dismantling dual school systems. The use of transportational facilities was among the four problem areas outlined in *Swann,* and the Court found "no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation." *Swann,* supra at 32.

The plan adopted by this Court necessarily contemplated bus transportation to create a unitary school system consistent with the requirements of *Brown.* Such bus transportation was found reasonable by the Sixth Circuit Court of Appeals as a permissible tool of desegregation under *Swann.* See *Kelley, et al v. Metropolitan County Board of Education, et al, supra.* The additional measure which this Court finds necessary today is not an extension of the bussing contemplated in the original plan of desegregation, but is merely the implementation of that plan required to secure to every school pupil his or her Constitutional right to equal and quality education. In the past school year, many of the school children of the Nashville area have been exposed to unreasonable hardships and potential dangers in exercising this Constitutional right to

equal educational opportunity. After a hearing, this Court finds that the cause of the hardships is not bussing per se, but is the consistent refusal of the school board and the City Council to provide an adequate number of school busses to implement effectively the plan of this Court. There is ample evidence that they are capable of doing so. In effect, the defendant to this cause has endeavored to accomplish indirectly what it cannot permissibly accomplish directly—the frustration of this Court's plan to establish a racially integrated school system. Then, relying upon the state of public unrest resulting from the staggered bussing schedules made necessary by their refusal to provide adequate school transportation, the defendant petitioned this Court to retreat from the integration progress made in the past year and to resegregate a number of schools in order to free the twenty-nine school busses necessary to relieve the burdensome schedule. This, by its very terms would be unconstitutional under *Brown* and its progeny. But, this is the only solution proposed to this Court by defendant.

In order to achieve an equitable solution to the troublesome issues facing the parties to this action and the citizens of Metropolitan Nashville, Tennessee, this Court holds that the defendant school board shall purchase such additional busses as are required to accomplish the terms of its order previously issued in this case. Testimony at the hearing, August 16, 1972, tended to show that certain members of the City Council and the Mayor of Nashville have applied pressure upon the school board to impede the effective implementation of the ordered plan. Therefore, pursuant to Rule 21, *Federal Rules of Civil Procedure*, the City Council and Mayor of Nashville have been joined as

parties defendant, and temporarily restrained, pending a hearing on the merits, from interfering in any manner with the implementation of this order by the defendant school board. United States District Courts have authority to prevent interference with its integration orders and protect rights guaranteed by the United States Constitution with a restraining order or an injunction. *Bullock v. United States*, 265 F.2d 683, 691 (6th Cir. 1959), *cert denied* 360 U.S. 909 (1959) and 360 U.S. 032 (1959), *reh'g. denied* 361 U.S. 855 (1960): *United States v. Farrar*, 414 F.2d 936 (5th Cir. 1969); *Kasper v. Brittain*, 245 F.2d 92, 95 (6th Cir. 1957), *cert. denied* 355 U.S. 834 (1957), *pet. for reh'g. denied* 355 U.S. 886 (1957); *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956); *United States v. Wallace*, 218 F. Supp. 290 (N.D.Ala. 1963); *Mapp v. Board of Education of the City of Chattanooga*, Civil No. 3564 (E.D. Tenn. filed February 4, 1972). *See also, Montgomery County Board of Education v. Shelton, supra.*

To the extent that such remedies are novel or unique, they are nonetheless but another example of the malleable tools which courts of equity have traditionally employed in fashioning appropriate relief in attaining the ends of justice:

> "The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed." *Swann, spra* [sic] at 31.

The determination by this Court of those remedial measures which are required to establish a viable and effective unitary school system is nothing more than a dis-

charge of the responsibility imposed by the Supreme Court:

> "The obligation of District Courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." *Green v. County School Board, supra,* at 439.

Many diverse circumstances and options will undoubtedly surface as individual cases come before the courts, but none of more significance and importance than the good faith efforts of local school authorities in employing available resources in a sincere effort to advance the spirit as well as the letter of the law. That factor may well be decisive in a negative as well as positive posture, and where good faith is lacking the courts may consider this element in fashioning relief:

> "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."
>
> *Brown v. Board of Education, supra,* at 299.

This Court has found ample evidence in the instant case that the defendant has not exhibited that measure of good faith commensurate with a dutiful implementation of this Court's school desegregation plan. Such lack of good faith has been evidenced by the asserted inability of the school board to spend and the refusal of the City Council to appropriate the available funds necessary to purchase the

transportational facilities essential to a reasonable and orderly execution of that plan. The basic thrust and end result of defendant's actions has been to perpetuate and endorse a bussing schedule so unreasonable and harsh that not only has the principal goal of a unitary system been obscured by public reaction and indignity, but also that the health, safety, and security of the children involved have been compromised by their exposure to risks and dangers. Such a program is not conceived in a spirit devoted to the abolition of segregation, and to quote a recent decision from the Fourth Circuit:

> ". . . if reassignment is mandated constitutionally, it must be effective and meaningful and 'more than a matter of words'. To repeat, the Court cannot compel the student to attend a distant school and then fail to provide him with the means to reach that school . . . What is determined here is that the school district as a part of its plan of desegregation must provide a practical method of affording free bussing for students assigned to schools beyond normal walking distance of their homes; the mechanics of the method to be employed by the school district in discharge of this duty are for the District Court." *Brewer v. School Board of City of Norfolk, Virginia*, 456 F.2d 943, 947, 948 (4th Cir. 1972).

What is practical will of necessity depend upon local circumstances, resources, and student dispersement, but in any case it should be that degree of transportation most reasonably calculated to effect the orderly and expeditious dismantling of a dual school system. In making this determination, school board authorities should be guided by a comparison of the best possible transportation plan under any set of circumstances versus that manner of transportation financially practical in their own

particular situation. When this analysis yields a program of school bussing reasonable and adequate within a given community, in light of all the prevailing circumstances, then it would indeed be improvident for a District Court to interfere. However, when a District Court finds, as it does in the instant case, that an unreasonable and inadequate program of school transportation has been instituted, not in response to realistic limitations of financial resources, but in creation of logistical barriers to the establishment of a unitary school system, then the Court can and will intercede.

The measures employable in this intercession can properly include directive orders in the utilization of public funds.

> "The day is past when courts held that available injunctive relief did not encompass orders specifying the manner in which state officials might collect or disburse public funds. When taxing or spending powers have been used in such a manner as to infringe upon Constitutional guaranties, and in cases when the exercise of such authority pursuant to judicial order is a form of relief 'necessary to prevent further racial discrimination', a federal court may govern by decree the discretion of state officers over the levying and diversion of public funds." *Bradley v. School Board of City of Richmond, Virginia,* 325 F.Supp 828, 846, (E.D. Va.1971)

In seeking to remedy Constitutional violations, a federal court may order that public funds be expended, particularly when such expenditure is necessary to meet the minimum requirements mandated by the Constitution. *Griffin v. County School Board of Prince Edward County,* 377 U.S. 218, 233, 84 S.Ct. 1226, 1234, 12 L.Ed. 2d 256 (1964);

Eaton v. New Hanover County Board of Education, 459 F.2d 684 (4th Cir. 1972); *Brewer v. School Board of City of Norfolk, Virginia, supra; Plaquemines Parish School Board v. United States,* 415 F.2d 817 (5th Cir. 1969); *Hosier v. Evans,* 314 F. Supp. 316 (D.V.I. 1970); *United States v. School District 151 of Cook County,* 301 F.Supp. 201 (D.C. 1969), modified 432 F.2d 1147 (7th Cir. 1970), *Cert. denied* 402 U.S. 943 (1970); *United States v. State of Texas,* 342 F.Supp. 24, 37, 38 (E.D.Tex. 1971); See also *Bradley et al v. Milliken et al,* Civ. No. 3527, filed July 11, 1972, currently on appeal to the Sixth Circuit Court of Appeals.

Given the choice presented by the school board to this Court on August 16, 1972, of whether, in order to protect the health and safety of the school children, to resegregate or to provide for more busses, this Court is compelled to order the relief outlined supra. Moreover, the Court deems the relief ordered herein to be a proper exercise of its power to provide equitable remedies in the implementation of a desegregation plan which "is well within the capacity of the school [board's] authority." See: *Swann, supra,* at 30. The school board has told this Court that the health and safety of some children are endangered by compelling them to return home after dark. Public misunderstanding and furor notwithstanding, this Court shall not allow children to be unequally and unreasonably subjected to the dangers that have been shown to exist and, furthermore, this Court shall not allow the integration of

the Nashville schools to be thwarted. It cannot fulfill its Constitutional obligation by requiring less.

This Court must uphold and apply the law, and the law to be applied herein is clear. Fortunately, the rights of minorities do not exist at the whim of public caprice, and although this Court is not unaware of public resistance to integration of the Nashville schools, it shall protect those rights guaranteed by the Constitution.

/s/ L. Clure Morton
United States District Judge

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[1] Although cognizant of the fact that Judge Merhige's desegragation order (338 F.Supp. 67) was reversed on grounds concerning the consolidation of political subdivisions, the Court is of the opinion that the exercise of equitable power by the Richmond Cout [sic], directing the expenditure of funds, was left undisturbed.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT W. KELLEY, ET AL, HENRY C. MAXWELL, ET AL.	)	
VS.	)	CIVIL NOS. 2094 AND 2956
METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL.	)	(Received Aug. 31, 1972)

ORDER

A hearing was had in this action August 24, 1972, after the Honorable L. Clure Morton, United States District Judge for this District, had recused himself by order entered August 22, 1972. The matters considered at the hearing and the actions taken are set forth hereinafter.

The first matter before the court was the report of the defendant Board of Education of the action it had taken in compliance with an order entered herein August 17, 1972, directing the Board to purchase thirty busses of eighty-four-passenger capacity each, and to rent such busses as were necessary pending delivery of the purchased busses.[1]

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[1] The court's order was in response to a petition filed by the defendant Board of Education asserting that, due to the staggering of school hours, some children were required to return home from school after dark, a dangerous situation in terms of their health and welfare. To alleviate this situation, the court was faced with the choice of permitting the resegregation of three junior high schools (as suggested by the Board) or providing for additional transportation. Since the Board's suggestion was obviously Constitutionally impermissible, the court directed the acquisition of additional buses.

James H. Harris, III, Esquire, attorney for the school board, orally presented the report. Briefly summarized, the report stated that arrangements had been made for the purchase and immediate delivery of twenty new sixty-six passenger buses, the ordering of fifteen eighty-four passenger busses to be delivered within six months and the leasing of fifteen used busses for service until delivery of the ordered busses. The oral report contained no statement as to the passenger capacity of the rental busses; however, the court has been informally advised that the rental busses are of the seventy-two-capacity type. Assuming that this is correct, the court finds that the report of the school board shows a good-faith compliance with the previous order, and it is, accordingly, approved.

The next matter considered by the court was the joinder of the Metropolitan Government of Nashville and Davidson County, Tennessee, as a party defendant. By order of August 17, 1972, the court had granted a motion which had been made by plaintiffs for the joinder of additional parties, but, apparently through oversight, the Metropolitan Government of Nashville and Davidson County, Tennessee, was not formally joined, although it was apparent from the hearing that all parties understood that it had been so joined. To complete the record, the court ordered said joinder.

The court next heard motions filed by certain of the joined defendants that they were entitled to summary judgment or that the action should be dismissed as to them. These motions were grounded on the assertion that the action was moot as to the joined defendants because the school board had complied with the court's order as to

the purchase of busses. A consideration of the motion for joinder indicated clearly to the court that the action was not moot as to the joined defendants; that they could have been joined previously and are now properly joined under the provision of Rule 20, Federal Rules of Civil Procedure. Accordingly, the motions seeking dismissal or summary judgment were denied.

Next, the court considered motions filed to vacate or strike the provisions of the order of August 17, 1972, relating to a temporary restraining order, to wit: paragraphs 7 and 9 of that order. The court was of the opinion that, since the school board had complied with the order pertaining to the purchase or rental of busses, the purpose of the temporary restraining order had been fulfilled and that it should be, and accordingly was, vacated.

The court rejected the contention that the temporary restraining order was in violation of any rights of the defendants secured to them by the First Amendment to the Constitution of the United States. This court is of the opinion that this Amendment protects the rights of citizens to make such statements, wise or foolish, as they are enabled to make by reason of their several abilities and are permitted to make by their several consciences. There is no right, under the First Amendment, to threaten punitive action against anyone because of obedience to the lawful orders of a court. The court was, and is, of the opinion that the temporary restraining order issued was fully justified by the totality of circumstances appearing to the court on August 17, 1972. The vacation of the order is based on the court's trust that all defendants in the case will now proceed, in good faith, to assist in the implemen-

tation of the orders heretofore entered in this action by both of the judges who have heretofore handled this case during its long history to the effect that the dual system of education heretofore found to exist be abolished.

/s/ Frank Ivy, Jr.
CHIEF JUDGE

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